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In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT K. BECK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR WRIT OF CERTIORARI

(Questions presented for review)

1. Did the Trial Court err in refusing to dismiss the entire case as a result of the grant of immunity which Appellant had received from the State of Colorado?

2. Did the Court err in denying a Motion for Judgment of Acquittal because the evidence presented at trial was insufficient to support a conviction?

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TABLE OF CONTENTS

	Page
1. (Reports of the case in the Court below)	2
2. (Grounds on which the jurisdiction of this Court is invoked)	2
3. (Citations of law involved in this case)	2-4
4. (Statements of the case)	4-6
5. (Arguments for allowance of the Writ)	6-12
6. Appendix	
a. Partial Opinion of the United States Court of Appeals	A-1 - A-19
b. Reporter's Transcript of Oral Argument on Post-Trial Motions (Court's Ruling)	B-1 - B-2
c. Reporter's Transcript of Jury Verdict	C1 - C-9

TABLE OF AUTHORITIES

Cases: *Page*

Kastigar v. United States, 406 U.S. 441, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972) 7, 8

Maxfield v. United States, 360 F.2d 97 (10th Cir. 1966) 10

Murphy v. The Water Front Commission of New York, 378 U.S. 52, 12 L.Ed. 2d 678, 84 S.Ct. 1591 (1964) 6

New Jersey v. Portash, 440 U.S. 450 (1979) 8

United States v. Foshee, 578 F.2d 629 (5th Cir. 1978) 11

United States v. Greene, 497 F.2d 1068 (7th Cir. 1974) 10

United States v. Nance, 502 F.2d 615 (8th Cir. 1974) 10

Wheeler v. District Court, 519 P.2d 327 (1974) 6

Other Authorities:

Colorado Revised Statutes 13-90-118 (1973 as amended) 2, 3, 6

Title 18, United States Code, §2 ..... 3, 4

Title 18, United States Code, §1341 ..... 2, 4

Title 28, United States Code, §1254(a) 2

Rules 17 and 20, Rules of the Supreme Court of the United States 2

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2. Did the Court err in denying a Motion for Judgment of Acquittal because the evidence presented at trial was insufficient to support a conviction?

1. (Reports of the case in the Court below)

Appellant, Beck, was convicted in a jury trial on three counts of a six-count indictment for mail fraud in violation of Title 18 U.S.C. §1341 and 2. Appellant was convicted in the United States District Court for the District of Colorado, and judgment against Appellant was entered on January 19, 1978. Certain matters had been reserved for decision until after trial, and on February 21 and 22, 1978, various defense motions were heard and denied. On May 12, 1978, Appellant, Beck, was sentenced to the custody of the Attorney General for a period of two years. An appeal was taken to the United States Court of Appeals for the Tenth Circuit and assigned number 78-1508, and an opinion of the Court of Appeals was filed on November 6, 1980, and not designated for publication.

2. (Grounds on which the jurisdiction of this Court is invoked)

The date of the judgment sought to be reviewed was filed in the United States Court of Appeals for the Tenth Circuit on November 6, 1980. Petititon for Rehearing With Suggestion for Rehearing *En Banc* was filed in the United States Court of Appeals for the Tenth Circuit on November 20, 1980. The Petition for Rehearing was denied by the United States Court of Appeals for the Tenth Circuit on February 20, 1981. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(a) and Rules 17 and 20 of the Rules of the Supreme Court of the United States.

3. (Citations of law involved in this case)
Colorado Revised Statutes 13-90-118 (1973 as amended)

"When in the judgment of any district attorney, attorney general, or special prosecutor of the state of Colorado the testimony of any witness or the

production of any books, papers, or other evidence by any witness in any case or proceeding before any court of the state of Colorado or before any grand jury of the state of Colorado, upon the consent of such grand jury, involving any violation of the penal laws of the state is necessary to the public interest, he may make application to the court that the witness be instructed to testify or produce evidence subject to the provisions of this section. Upon order of the court, the witness shall not be excused from testifying or from producing books, papers, or other evidence on the grounds that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no such witness may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor may testimony so compelled be used as evidence in any criminal proceeding against him in any court, except a prosecution for perjury in the first degree or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."

Title 18 United States Code §2

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18 United States Code §1341

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

4. (Statement of the case)

Appellant was charged in the United States District Court for the District of Colorado with mail fraud in violation of Title 18 U.S.C. §1341 and 2. Original jurisdiction in the United States District Court was acquired in the first instance by the allegations of violations of Federal Criminal Statutes.

Before the trial in this matter, Appellant filed a Motion for dismissal of the case, the basis of which was that

Appellant had previously been granted immunity from prosecution by the State of Colorado.

All rulings were reserved on the Motion until after the trial had concluded. On February 21 and 22, 1978, a hearing was held.

Appellant demonstrated at the hearing that he had been given witness immunity by State authorities in exchange for his testimony before a Special Grand Jury in the State Courts which was investigating the very same series of transactions that ultimately became the basis for this prosecution. Appellant also demonstrated that as a result of his Grand Jury testimony the state had made use of his immunized testimony in the issuance of search warrants for the books and records of O'Keefe, Baldwin and Associates. Use of Appellant's immunized testimony was demonstrated by the fact that the United States Attorney's Office had in their possession the transcript of the Grand Jury testimony during cross-examination of Appellant during trial. The immunized testimony was also used by the State authorities in providing the postal authorities with a list of names and address of various witnesses. At the conclusion of the evidence the Motion to Dismiss was denied by the Trial Court as he found that the evidence was "free of taint". The Court, however, did find that Appellant had in fact received witness immunity.

At the close of the prosecution's case, and again at the close of all of the evidence, Appellant moved for a judgment of acquittal alleging in part that the evidence was insufficient to support a conviction in this case. From the return of inconsistent verdicts, it is clear that the jury did not decide that the sales program was a scheme or artifice to defraud. Despite the verdicts returned, the Court found the sales method to be a fraudulent scheme. Appellant was not allowed to present any evidence of the value of the real

property at issue: evidence that was essential to a determination of whether the alleged victims were defrauded out of money or some other thing of value. Because of the fact that the Appellant was precluded from presenting evidence about value, he was deprived of his right to present a defense which would have shown the lack of any intent to defraud the alleged victims. The Court, however, denied the Motion.

5. (Arguments for allowance of the Writ)

I.

At the post-trial hearing, two representatives of the Colorado Bureau of Investigation testified regarding an investigation that had previously been concluded by the State of Colorado. The testimony of Officer Ralph Ruzicka and Special Prosecutor, Harold Haddon, who was conducting the Grand Jury in Pueblo, Colorado, makes it apparent that Appellant, Beck, was assured witness immunity in exchange for his testimony before the Special Grand Jury. The Trial Court determined that the Appellant, Beck, had in fact been granted witness immunity even though it was done informally and without benefit of a State Court Order.

Under the Colorado Revised Statutes, 13-90-118 (1973 as amended), witness immunity under state law can only be transactional immunity. See *Wheeler v. District Court*, 519 P.2d 327 (1974). *In Murphy v. The Water Front Commission of New York*, 378 U.S. 52, 79, 12 L.Ed.2d. 678, 84 S.Ct. 1591 (1964), this Court decided that a state witness could not be compelled to give testimony which could be used by Federal officials in connection with a Federal criminal prosecution, deciding in effect that even the grant of transactional immunity in State Court amounts to a grant of both use and derivative use immunity if the same transaction or series of transactions is to be prosecuted in Fed-

eral Court. In theory, this leaves a Defendant in the same position relative to the Federal authorities that he was in prior to the time he received immunity. *Kastigar v. United States*, 406 U.S. 441, 32 L.Ed. 212, 92 S.Ct. 1653 (1972).

The testimony in the post-trial hearing held in this case indicates that all of the records of O'Keefe, Baldwin and Associates came into the custody of the State authorities as the result of search warrants and that part of the information used to obtain those search warrants was acquired from Appellant, Beck. Testimony also established that there were meetings between the State and Federal authorities regarding coordinating the investigations that were being carried on by both sovereigns. The hearing is replete with testimony that all records in the hands of the State authorities were available to the postal authorities at any time to rumage through those records and find anything that might be helpful to their case. Agent Williams of the Colorado Bureau of Investigation further testified that he gave the name of Terry Robinson, and the names of other witnesses to the postal authorities in reference to the Federal investigation of this case. Terry Robinson and his wife Rose were two of the government's key witnesses in attempting to put this case together. Agent Williams also testified that the file on Don Adams, who was the alleged victim in Count I of the Indictment, was given to postal authorities as well, but it is unclear where this file came from.

In addition, the evidence is clear that the United States Attorney's Office acquired a copy of the Grand Jury testimony of Appellant, Beck, after his direct examination at trial.

It is Appellant's contention that the United States Court of Appeals for the Tenth Circuit erred in its find-

ing that possession alone of a transcript of immunized testimony does not constitute a use, and hence is not tainted.

Based upon the facts and case law in this area, such a distinction as the Court has applied would render the Appellant's Fifth Amendment right as meaningless.

In *Kastigar v. United States, supra,* the Court found that a grant of immunity will serve as a total substitution for the original Fifth Amendment right. It would be a fallacy to believe that Appellant was in the same position relative to the Federal authorities that he was in prior to the time he received immunity. Certainly his position has been changed by the fact that the government prosecutor sat at counsel table reviewing a transcript of immunized testimony in a trial where Appellant was called as a witness.

Undoubtedly, the government prosecutor would not have had such transcript, but for the fact that Appellant had testified before the Grand Jury. The availability and possession of such transcript by the government prosecutor at trial undermines the very concept of a grant of immunity and thus should constitute a use.

In *New Jersey v. Portash,* 440 U.S. 450 (1979) the Supreme Court decided that any use of immunized Grand Jury testimony against the person so immunized would violate the United States Constitution.

Viewed as a whole the evidence demonstrates that certain information was received by Federal authorities from the state investigation, and from immunized testimony. In *Kastigar v. United States, supra,* at pp. 460, 461, the Court held that the prosecutor has an affirmative duty to prove that it derived its evidence from legitimate sources, and goes on to find that this burden of proof is substantial.

It is the contention of Appellant that the government has failed to meet their burden of proof in that they have

failed to prove the sources of the Federal information which overlapped with information given them by the State authorities.

In the original hearing on the Motion to Dismiss, the District Judge found that although ". . . there is some disagreement factually here about what Mr. Velthone, (postal inspector) did or did not do with respect to the records made available to him . . ." the Federal government had met the burden to show its evidence free of taint. The United States Court of Appeals for the Tenth Circuit found in their opinion that ". . . the evidence supports inferences that the government had independent sources for such information or did not use the evidence in question . . ."

Appellant contends, however, that inferences of independent sources is not a sufficient standard of proof to meet the government's substantial burden. It is not enough to merely deny acquiring information from the state authorities, but instead the government should have been required to prove with certainty its independent, legitimate source of evidence presented at trial. The government has failed to meet the standard of proof that the courts should have applied in this matter to determine whether the government made use or derivative use of the immunized testimony.

II.

Appellant, Beck, contends that the jury verdict was not amply supported by the record and that the District Court erred in denying a judgment of acquittal.

The main thrust of the Indictment in this case and the evidence as presented by the government, was that supposed equity in each parcel of real property was the basis of this scheme to defraud.

Both defendants admitted that they used the sales pitch which had been developed by O'Keefe, yet the jury found Beck not guilty on three counts and found his co-defendant not guilty on all counts. It must logically follow that the jury did not find that the sales pitch regarding equity was a part of a scheme to defraud. Had the jury made such a finding it would have been required to follow the instructions and return verdicts of guilty regarding both defendants on all counts.

We recognize that inconsistent verdicts have held to be acceptable in the Federal courts, *Maxfield v. United States*, 360 F.2d 97 (10th Cir. 1966), *United States v. Greene*, 497 F.2d 1068 (7th Cir. 1974), however, the verdicts of not guilty in this case cannot be ignored. If the sales program itself was not a violation of the mail fraud statute, then the proof presented by the government in support of this indictment is at variance with the indictment and will not support a conviction on these charges.

There was insufficient evidence to support the verdicts of guilty or inference that Appellant, Beck, took any part in devising a scheme to defraud and that any acts he did perform were done with the willful intent to defraud anyone. The government failed to show any scheme to defraud and failed to show guilty knowledge and fraudulent intent from the onset in order to prove mail fraud. *United States v. Nance*, 502 F.2d 615 (8th Cir. 1974).

In order to prove the fraud in the first instance, it was necessary for the government to prove that the alleged victims were defrauded out of money or some other thing of value. The government did not prove that the real property was worth less than what the prospective purchasers were told and when Appellant attempted to present evidence regarding the value of the real property at issue, he was foreclosed from presenting such evidence by a ruling

of the Trial Court indicating that such evidence would be collateral to the issues before the jury. Such testimony, had it been permitted, would have demonstrated that the real property was in fact worth the amount it was represented to be worth at that time.

It is the contention of Appellant that the issue of value is central and certainly not collateral to the case. If the government was to meet their burden of proof beyond a reasonable doubt, it was crucial for them to prove that the alleged victims paid a price in excess of the value and consideration received. Without such proof of value, it is impossible to determine if in fact the alleged victims were defrauded.

The question of a defendant's intent is of paramount importance. *United States v. Foshee,* 578 F.2d 629 (5th Cir. 1978) . There is no question that the government was required to prove that intent as an element of the charge in this case. The Court's preclusion of Appellant's evidence of a professional appraisal of the property in question also precluded the Appellant from showing lack of any intent to defraud the alleged victims. This had the effect of depriving Appellant of his right to present a defense which fairly met the allegations contained in the Indictment.

The government presented no evidence to indicate that Beck had any knowledge whatever of the manner in which the land was originally purchased by O'Keefe, Baldwin and Associates. To support a conviction in this matter, the government should have been required to prove that Beck took part in devising this sales program and that when he did devise the program he had an intent to defraud potential purchasers. No such evidence was presented, and no evidence was presented from which such an inference could be drawn.

Based upon the above circumstances, this Court is urged to grant a Writ of Certiorari so that it may review the conviction of the Appellant below.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT K. BECK,
Defendant-Appellant.

No. 78-1508

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(D.C. No. 77-CR-250)

J. Terry Wiggins, Attorney, Denver, Colorado, for Defendant-Appellant

Richard S. Vermeire, Assistant United States Attorney, Denver, Colorado (Joseph Dolan, United States Attorney, Denver, Colorado was on the brief) for Plaintiff-Appellee

Before SETH, Chief Judge, and HOLLOWAY and MCWILLIAMS, Circuit Judges

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HOLLOWAY, Circuit Judge

This is a direct appeal by the defendant-appellant Robert K. Beck from his jury conviction on three counts of a six-count indictment charging Beck, Gilbert J. Szajna, and three others with mail fraud in violation of 18 U.S.C. §§ 1341 and 2. Szajna, who was tried with the defendant, received a judgment of acquittal from the district court on the sixth count at the close of the government's case-in-chief and was acquitted by the jury on the other five counts. For the three counts on which he was found guilty defendant was sentenced to concurrent two (2) year terms for each count, and he appeals.

Defendant's basic contentions on appeal are that the trial court erred: (1) in refusing to dismiss the entire case as a result of the grant of immunity which he had received from the State of Colorado; (2) in refusing to dismiss the indictment due to selective prosecution by the government; (3) in refusing to dismiss the case because of pre-indictment delay; and (4) in denying a motion for judgment of acquittal, the evidence being insufficient to support the convictions.

I

Viewing all the evidence, together with all reasonable inferences therefrom in the light most favorable to the government as we must on this appeal from a guilty verdict, *United States v. Twilligear*, 460 F.2d 79, 80-81 (10th Cir.), the evidence tended to show the following facts.

In March 1973 co-indictee Danny O'Keefe and Charles Baldwin, acting through a Colorado corporation named O'Keefe, Baldwin & Associates, Inc., purchased from an investment company a Colorado cattle ranch of more than 13,000 acres. Although the property was purchased at approximately $66.00 per acre, it was determined by O'Keefe and Baldwin, the sole corporate stockholders, that the corporation would subdivide and resell the property in 40 acre

tracts at approximately $5,600 with a list price of approximately $8,000.

Shortly thereafter defendant was hired by O'Keefe and Baldwin as the office and sales manager of the Project. Initially defendant helped organize the office, find office space, and hire the salesmen. In addition, he had substantial responsibility for developing the sales brochure for the project by taking pictures of the land to be sold, gathering information about the surrounding area, setting up the brochure's format, writing the textual material, and reviewing the brochure's preliminary proofs. He also organized the development of a plat map for the project, the initial surveying and subdividing of the ranch land, and the construction of access roads within the project.

In April 1973 the sale of forty acre parcels began in earnest. Variations on an advertisement which had been developed by O'Keefe were prepared, paid for, and sent by defendant to newspapers throughout the country. The ads generally indicated that to purchase a forty acre parcel, which originally sold for $8,400, the prior owner's equity of $1,700 could be purchased by making two back payments and by assuming the principal balance of approximately $6,700 from the prior owner. The ads gave fictitious names and a telephone number and interested parties were instructed to call collect. When prospective customers called, defendant and the other salesmen would provide a favorable description of the property and would tell the customers, *inter alia*, that the prior owner had financial troubles and was unable to continue making the monthly payments and that they would be getting the benefit of the prior owner's equity in the property for only two back payments.

If the customer was still interested then a sales brochure was mailed out the same day along with a sales con-

tract which contained the legal property description of a forty acre parcel. When the customer returned a signed contract with the two "back payments" defendant, who was also vice president of the company, would execute the contract for the company. A warranty deed would then be drafted and mailed along with the executed sales contract to a Colorado bank which would hold the documents in escrow until all the payments were made by the customer.

Included in the sales contract was a provision which permitted the buyer to obtain a refund of his payments if he disliked the property after inspecting it within a specified number of days after signing the contract. When buyers came to inspect their property, defendant and the other salesmen kept the customers separated from each other, did not allow a customer to listen to a sales presentation made to another customer, and did not tell the customer how the other property was being sold. These precautions were taken to prevent individual buyers from knowing that other buyers could purchase identical size parcels under the same terms. When it appeared that an inspecting customer was going to ask for a refund, defendant and the other salesmen emphasized that the other lots had sold for the original purchase price of $8,400 and that the customer was getting a bargain when he assumed a principal balance of $6,700 and obtained the prior owner's equity for only two back payments.

The evidence tended to show that these representations about the equity in the property made to customers during phone conversations and inspection tours, along with other representations concerning the adequacy of zoning regulations and the availability of utilities, water, and access roads within the development, were false or misleading. Further evidence will be detailed as necessary in discussing defendant's appellate contentions, to which we now turn.

II

The claim of witness immunity given to defendant

Prior to trial defendant moved to dismiss the indictment on the ground that the "United States Government is collaterally estopped from refusing to recognize . . . [his] immunity from prosecution in this case." I R. 13. Defendant alleged, *inter alia*, that he had been "compelled to testify before the State Grand Jury [of Colorado] which was investigating substantially similar events"; that he had been "informed that as a result of his cooperation and testimony, he would not be prosecuted in any State case arising from the events being investigated by the State Grand Jury"; that in furtherance of the state prosecutor's promise not to prosecute him, the prosecutor intentionally did not inform him of his constitutional rights prior to taking the stand at the state grand jury proceeding; and that the state's actions "estopped [it] from denying that . . . [he] was, in effect, granted immunity from prosecution." *Id.*

At a pre-trial hearing and again at the beginning of the trial the district court refused to rule on the motion to dismiss and informed the parties that the motion could be raised if necessary after the trial. After trial, defendant moved for a judgment of acquittal or, in the alternative, for a new trial based in part on "the grant or intended grant of state immunity." After an evidentiary hearing and arguments by counsel the district court found that immunity had been granted "very informally" by the State. XXIII R. 20. It was found, however, that the federal government had met its burden of showing that its evidence was "free of taint." *Id.* at 21, 24. Accordingly, the district court denied this part of defendant's motion. *Id.* at 24.

On this appeal defendant argues "that the trial court's ruling in this matter is error in light of the evidence pre-

sented at the hearing, and the circumstances under which [he] testified." Brief of Appellant at 12. In essence, defendant challenges the sufficiency of the evidence to support the trial court's finding that the evidence presented at trial by the government was free of taint. The government contends that the "[f]ederal prosecution of a state immunized witness is not fundamentally unfair" and that it "met its burden of proving that defendant's testimony before the State Grand Jury was not used in the federal investigation." Brief of Appellee at 9.[1]

A state's grant of immunity does not *ipso facto* preclude a federal prosecution based on related matters. *See United States v. Anzalone*, 555 F.2d 317, 320 (2d Cir.), *cert. denied*, 434 U.S. 1015; *United States v. Barker*, 542 F.2d 479, 482, (8th Cir.). There are, however, Fifth Amendment protections which circumscribe a federal prosecution once a state has granted immunity to an individual. Fundamental fairness and the federal constitutional guarantee against self-incrimination mandate that state immunized testimony and its fruits not be used, directly or indirectly, to prosecute a federal charge. *See Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79; *accord Kastigar v. United States*, 406 U.S. 441, 457; *see also United States v. First Western State Bank*, 491 F. 2d 780, 782-83 (8th Cir.), *cert. denied*, 419 U.S. 825. "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Murphy v.*

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[1]Citing Colo. Rev. Stat. § 13-90-118 (1973); defendant argues that "witness immunity under state law can only be transactional immunity." Brief of Appellant at 13. Our record does not show that the steps outlined in this statute for granting immunity were taken, but no question is raised about the finding that immunity was granted.

Waterfront Comm'n, supra, 378 U.S. at 79 n. 18. This burden "is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar, supra*, 406 U.S. at 460.

Here the district court rejected defendant's contentions and found, after noting a discrepancy in the evidence, that the government had met the "heavy burden" of showing that its evidence was "free of taint." XXIII R. 21, 24. Unless clearly erroneous, we must accept this finding of fact by the district court. *See, e.g., United States v. Romano*, 583 F.2d 1, 7 (1st Cir.); *see generally* 2 C. Wright, Federal Practice and Procedure §374 at 188 n. 72.

There was evidence tending to show that the government began its investigation shortly after receiving a letter dated March 22, 1974, from a land purchaser who complained about a transaction which he had entered into with Las Animas Ranch – the successor corporation to O'Keefe, Baldwin & Associates. After a preliminary investigation including the questioning of former employees of O'Keefe, Baldwin & Associates, a determination was made by the postal service to refer the case to a major fraud specialist within the service for further investigation. On or about February 12, 1975, almost two years prior to defendant's testimony before the state grand jury in January 1977, federal authorities subpoenaed all the records of the land transactions held by a Colorado bank which was acting as an escrow agent for the sales project. The subpoena produced approximately 500 files containing installment sales contracts for sales of 40 acre parcels. These contracts and related documents contained in the bank files had the names and addresses of the individual purchasers and the names of the salesman involved in the transaction. *See, e.g.*, III R. 18, 25, 42, 74-75; X R. 64-65; XII R. 105.

In June 1975 a questionnaire was prepared and sent to a random sample of 100 persons whose names appeared on the installment sales contracts. XX R. 93-98; XXI R. 2, 103-04. As responses to the postal service questionnaire came back, files were developed on potential witnessess. The information obtained during this period preceded the state grant of immunity and therefore should be available for use by the government. *See United States v. First Western State Bank, supra,* 491 F.2d at 783; *see also United States v. Romano, supra,* 583 F. 2d at 8.

Further information and leads to other potential victims were obtained by postal inspectors from Baldwin who had sent questionnaires of his own to purchasers of the forty acre parcels. Baldwin was interviewed by postal inspectors in August 1977, approximately seven months after defendant's state grand jury appearance, and at that time Baldwin permitted postal authorities to copy the information which he had received as a result of his questionnaires. Defendant claims that this information is "indirectly derived from . . . [his] Grand Jury testimony" since Baldwin "might not have been charged in state court and giving information at all if it had not been for . . . [his] Grand Jury testimony." Brief of Appellant at 15. While the possibility exists that the immunized testimony of one individual may cause another person to cooperate and give information which is subsequently used to help convict the first person, see *United States v. Romano, supra,* 583 F.2d at 9; we believe that such a claim in this case is tenuous, and that the argument does not show that the trial court erred in its general finding that the Government had met the burden of showing that its evidence was free of taint. (XXIII R. 21).

Defendant also points to testimony which, he says, "indicates that all the records of O'Keefe, Baldwin & Associates came into the custody of state authorities as the result

of a search warrant, and that part of the information used to obtain that search warrant was acquired from the Defendant . . . ." Additionally he claims that state officials met several times with federal postal authorities and gave them information on several witnesses, and a file on Don Adams, the alleged victim in count one of the indictment. The argument is that federal authorities secured leads and derived evidence from state officials who not only were exposed to defendant's immunized testimony, but who also derived much of their own information from the fruits of a state search warrant issued pursuant to an affidavit based in part on information acquired from the defendant. *See* Brief of Appellant at 14-17.

The evidence presented at the post-verdict hearing shows that Ralph Ruzicka, an agent for the Colorado Bureau of Investigation (CBI), attended the state grand jury proceeding at which defendant testified and that he subsequently filed a probable cause affidavit for a search warrant which led to the seizure of records belonging to O'Keefe, Baldwin & Associates. Although Ruzicka was told by the state's special prosecutor "to use only conversations he had outside the Grand Jury room as a basis for the search warrant," Ruzicka did indicate at several points during his testimony that the search warrant was "a result of" the grand jury testimony of several individuals, including defendant. XX R. 19, 40. We feel, however, that the evidence supports inferences that the government had independent sources for such information, or did not use the evidence in question, as explained below.

The evidence shows that federal authorities determined that their investigation and any charges arising therefrom should not overlap with any state investigation or charges. Mr. Velthoen, a postal inspector, did meet with a state CBI investigator and obtained a copy of the state's indictments, with attached witness lists. Velthoen also ob-

tained a copy of an appraiser's report on the value of the land which had been sold, a file on a customer named Richard Young, and an address on Terry and Rose Robinson, two past employees of O'Keefe, Baldwin & Associates who subsequently testified for the government at defendant's trial.[2] At a second meeting, Velthoen obtained another file on a customer named Don Adams. Aside from this information, the postal inspectors received nothing further from state investigators.

We are satisfied that the record supports the conclusion that the federal government either made no use or derivative use of this information or had a legitimate, independent source for the information that was subsequently used in the prosecution of the defendant.[3] Mr. Velthoen testified that the file on Young was never used and that this purchaser was never contacted. This was corroborated by Velthoen's investigative report to the U.S. Attorney's office. With respect to the information on Adams, the alleged victim in count one of the indictment who testified for the government at defendant's trial, there was evidence that the postal inspectors initially obtained his name from Charles Baldwin — a legitimate, independent source of information. Moreover, Robinson, another postal inspector working with Velthoen, contacted Adams who said that he had previously sent his own file to the state attorney general's office. Adams gave permission to the postal inspectors to secure a copy of that file from state authorities. XX R. 113; XXI R. 99-100, 110-11; *see also* IV R. 34-38, 46-48. Thus the evidence derived by the government was shown to be legitimately developed by the government following its lead to Adams from Baldwin.

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[2]Terry Robinson's testimony was a very important part of the government's case and quite damaging to defendant.

[3]On this appeal, defendant does not specifically mention the state's indictment, the attached witness lists, and the appraiser's report.

With respect to the information acquired by the postal inspectors on Terry and Rose Robinson, two major prosecution witnesses, the evidence shows that a state CBI investigator did give the address of Terry Robinson to postal inspector Velthoen. However the postal inspectors already had Robinson's name as a result of information derived from Charles Baldwin and from the subpoena of the bank records. The evidence presented at trial shows that Terry Robinson was the leading salesman for O'Keefe, Baldwin & Associates (IX R. 64) and thus had his name on many of the contracts which were eventually subpoenaed from the bank and that Charles Baldwin knew both Terry and Rose Robinson. Again the trial court's finding that the government's evidence was free of taint is not undermined.

Finally, defendant contends that the United States Attorney's office "acquired a copy of . . . [his] Grand Jury testimony after his direct examination in the trial of this case," and that proof of this fact "is sufficient to show taint." Brief of Appellant at 16.

It has been held that the government's heavy burden of establishing a legitimate, independent source for its evidence is not sustained where its prosecutor has been exposed to a defendant's prior immunized testimony. *See, e.g., United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir.); *United States v. Rice*, 421 F. Supp. 871, 877 (E.D. Ill.). We believe, however, that these cases are distinguishable. There the prosecuting attorney had extensive exposure to the defendant's immunized testimony before a formal charge was filed against the defendant. In such a situation, the Eighth Circuit found "the government's burden of proof . . . virtually undischargeable." *United States v. McDaniel, supra* 482 F.2d at 312.

Such a situation is not presented in this case. Here the defendant's immunized grand jury testimony was obtained by the government at a very late stage in the crim-

inal proceeding. The evidence clearly shows that the attorneys prosecuting the case acquired a copy of defendant's immunized grand jury testimony sometime during the cross-examination of the defendant — long after the government had rested its case.[4] The defendant does not contend that the postal inspectors investigating the case obtained a copy of or had knowledge of the contents of his grand jury testimony. Moreover, defendant does not say that the prosecuting attorneys actually used his grand jury testimony in the course of cross-examining him. Defendant would have us hold that merely "obtaining a copy of the Grand Jury transcript is sufficient to show taint," so that the government could not demonstrate a lack of taint. Under the facts of this case, we decline to make such a holding. *See United States v. Bianco*, 534 F. 2d 501, 511 n. 14 (2d Cir.), *cert. denied*, 429 U.S. 822; *United States v. Catalano*, 491 F.2d 268, 272 (2d Cir.), *cert. denied*, 419 U.S. 825; *United States v. Henderson*, 406 F. Supp. 417, 427 (D. Del.).

In sum, we find no error in the trial court's finding and its ruling rejecting the contentions concerning the immunity issue.

(III and IV omitted because not applicable)

V

The sufficiency of the evidence

Defendant argues that the evidence was insufficient to support his convictions and that consequently the trial

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[4]The testimony of the government prosecutors indicates that they obtained a copy of the transcript at that time so that it could be available "for use or assistance in cross-examining Mr. Beck." XXI R. 66; *see also* XXII R. 506. This possibility would now appear to be foreclosed by the Supreme Court's decision in *New Jersey v. Portash*, 440 U.S. 450 which held "that a person's testimony before a grand jury under a grant of immunity cannot constitutionally be used to impeach him when he is a defendant in a later criminal trial." *Id.* at 459-60.

court erred in denying a judgment of acquittal. More specifically he says that the evidence failed to show that the equity marketing plan was part of a scheme to defraud, that he "took any part in devising a scheme to defraud," and that he had the requisite "knowledge and fraudulent intent from the outset" to defraud the customers of the land sales project. Brief of Appellant at 26-29. Defendant admits that he used the equity sales promotion with prospective purchasers and that he caused the mails to be used to further the land sales project. Brief of Appellant at 6, 27. Defendant testified, *inter alia*, that he did not make any misrepresentations concerning water, utilities, or access roads.

The essential elements which the government must prove in a mail fraud prosecution are (1) a scheme to defraud and (2) the use of the mails to execute or further this scheme. *United States v. Allen, supra*, 554 F.2d at 408; *United States v. Blosser*, 440 F.2d 697, 700 (10th Cir.) In conjunction with proof of the existence of a scheme to defraud, the government must also show that the defendant was part of that scheme. *United States v. Pearlstein*, 576 F.2d 531, 537 (3d Cir.). The essential matter of proof in the govenrment's case is the knowing participation by the defendant in a scheme to defraud in which the mails are used. *Hofmann v. United States*, 353 F.2d 188, 191 (10th Cir.).

The fraudulent scheme

As to the existence of a fraudulent scheme,[7] the proof favorable to the government overwhelmingly tended to show that defendant and the other salesmen used newspaper advertisements and a sales pitch which erroneously

[7]A scheme is fraudulent "if it is reasonably calculated to deceive persons of ordinary prudence and comprehension." *Gusow v. United States*, 347 F.2d 755, 756 (10th Cir.), *cert. denied*, 382 U.S. 906.

led purchasers to believe that they were obtaining a defaulting prior purchaser's equity in a specific forty acre parcel, *see e.g.*, III R. 45; VII R. 49-50; XIV R. 91-92; XV R. 49-61; that there was in fact no equity in the property being sold as claimed by the salesmen, *e.g.*, III R. 45, 101-02; X R. 10-12, 122; XIV R. 92; and that most of the 13,000 acres were sold using this marketing scheme, II R. 54; III R. 49; XV R. 32. There was also evidence that defendant and the other salesmen misrepresented the facts concerning the availability of utilities, water, and access roads to the individual parcels. They led customers to believe that utility lines such as electric, gas, and telephone would be available to their property lines at no cost to them, when in fact no lines currently existed to each parcel and there were no plans for the company or the local electric company to construct such lines. They also told customers that water was available by wells at 20 to 100 feet in depth, when in fact the average depth currently existing windmill wells ranged from 100 to 200 feet, and water for household use was only available at depths of 225 to 510 feet.

With respect to access roads to the individual forty acre parcels, various customers were told that the company would provide a "feasible access" into the parcels, that the roads would be "hardsurface-type roads," or that the roads would be brought up to "county specifications" with the county maintaining them. Under the general heading of "Location," the sales brochures told customers that "access by county and state roads is excellent," and while defendant explained at trial that this statement referred to "the access to the ranch," there was nothing in the brochure to indicate that access to the individual parcels would be any different. The roads which were eventually put in by the company were merely bladed roads where the grass was cut down to the soil. These were not gravel roads and

they deteriorated into mud after each rain or storm. In fact, the company never intended to provide the customer with anything other than a bladed access road to his individual parcel and defendant, who was responsible for the road development, never contacted the county about accepting or maintaining the roads.

In addition, the salesmen were instructed not to bring up the subject of zoning to the customers despite the fact that the property being sold had been zoned by the county for one family dwelling per 320 acres and that the company's rezoning petitions had been denied. While some customers were not informed of the zoning problem, others were told that there were no zoning restrictions on the property.

A scheme is fraudulent within the meaning of 18 U.S.C. §1341 if it is effected by deceitful statements or half-truths or the concealment of material facts. *United States v. Allen, supra,* 554 F.2d at 410. Where the scheme to defraud includes false representations conveyed through salesmen, proof of the same misrepresentations being made to different persons by numerous salesmen in the same period tends to prove that the scheme existed and that the particular salesmen were carrying it out. *See United States v. Krohn,* 573 F.2d 1382, 1388 n. 8 (10th Cir.), *cert. denied,* 436 U.S. 949. We are convinced that the evidence was sufficient for a finding beyond a reasonable doubt that a fraudulent scheme existed and that it was carried on by defendant and the other salesmen.

Fraudulent intent.

We must also consider whether there is sufficient evidence establishing that defendant's participation in the scheme was willful and with knowledge of its fraudulent nature, and with the intent that its illicit objectives be

achieved. *See United States v. Pearlstein, supra,* 576 F. 2d at 537, 540-41. Because the requisite knowledge and intent are often difficult to prove by direct evidence, these elements may be inferred from the statements and activities of the participating individual, *see United States v. Seasholtz, supra,* 435 F.2d at 8, or "from a pattern of conduct or a series of acts, aptly designated as badges of fraud." *United States v. Krohn, supra,* 573 F.2d at 1386. In mail fraud cases, where the evidence shows that the individual acted with "reckless indifference" as to whether a representation was true or false, he is chargeable as if he had knowledge of its falsity. *See United States v. McDonald,* 576 F.2d 1350, 1358 (9th Cir.), *cert. denied,* 439 U.S. 830; *Elbel v. United States,* 364 F.2d 127, 134 (10th Cir.), *cert. denied,* 385 U.S. 1014.

The defendant admitted at trial that he used the equity sales promotion on customers, that he knew the newspaper advertisements and such sales talk led customers to believe they were receiving the prior owner's equity in the property, and that he left O'Keefe, Baldwin & Associates because of his dislike for the equity sales approach in which he told customers "something that might not have been true." XII R. 147-48. There was also testimony from a salesman that defendant told him that "people had the tendency more to respond to greed," and that if people "thought they was getting what someone else had already got that they would be more apt to pick up the land." IX R. 26.

One significant factor in evaluating defendant's knowledge of the scheme to defraud is his role in the overall operation. *United States v. Pearlstein, supra,* 576 F. 2d at 542; *see also United States v. Krohn, supra,* 573 F.2d at 1388. As noted, the evidence showed that defendant as sales and office manager had a significant role in organizing the sales office, hiring the sales personnel, and instructing the staff on the sales presentation. He also had significant re-

sponsibility for the creation of the sales brochure which, according to the testimony of one salesman, contained at least one misleading picture of the land to be sold. IX R. 62-63.

To rebut the inference that he was culpably involved and knowingly furthered the fraudulent scheme, defendant introduced evidence at trial and argues here that he relied on information from O'Keefe that a lawyer had approved the sales program due to the way in which the ranch had been purchased by O'Keefe, Baldwin & Associates; and that he also relied on legal advice from O'Keefe's attorney "that the zoning situation was not in fact a problem and that the County Commissioners . . . were incorrect in their view of the zoning." Brief of Appellant at 5, 8-9, 29; XII R. 87, 124, 130, 134-35, 138; XIV R. 11-12, 76, 114-15.

Reliance on an attorney's advice concerning the legality of a transaction is a fact to be considered with other circumstances on the question of the defendant's good faith in a mail fraud case. *See Linden v. United States*, 254 F. 2d 560, 568 (4th Cir.); *see United States v. Seasholtz, supra*, 435 F.2d at 7-9; *see generally Williamson v. United States*, 207 U.S. 425, 453. It does not, however, "under all circumstances constitute an impregnable wall of defense." *See Linden v. United States, supra*, 254 F.2d at 568. Instead, it merely presents a question of good faith which is to be determined by a properly instructed jury. *See United States v. Blosser*, 440 F.2d 697, 700 (10th Cir.); *United States v. Seasholtz, supra*, 435 F.2d at 8-9; *Hawley v. United States*, 133 F.2d 966, 970 (10th Cir.). There is substantial evidence in the record from which the jury could have found beyond a reasonable doubt that defendant knowingly or recklessly made misrepresentations to prospective purchasers concerning utilities, water and access roads, as well as on the equity in the properties and zoning, and that he made these misrepresentations to further the fraudulent

scheme. Consequently the jury's rejection of the good faith defense is supported by the record.

Defendant argues that it was necessary to prove the fraudulent intent required by the mail fraud statute "by showing that the land was not in fact worth what was being ask for it." He maintains that the evidence showed that the purchasers were getting "a good buy" and "that the property was in fact worth the amount it was represented to be worth." He also argues that the value of the property was of utmost importance in this case, that the prosecution totally failed to present any evidence whatever concerning the value of the Las Animas County property, and that the trial judge precluded the defense from presenting such evidence through an expert appraisal. Brief of Appellant at 29-30.

Of course, the value of an item sold as a result of a fraudulent scheme may be relevant in proving a defendant's intent. *See, e.g., Holmes v. United States,* 134 F.2d 125, 133 (8th Cir.), *cert. denied,* 319 U.S. 776. However, it is not the only evidence which shows that the defendant had the requisite intent to defraud customers when he promoted the sale of land for O'Keefe, Baldwin & Associates. By his misrepresentations on other specific matters, made knowingly or recklessly, and which were false and misleading, defendant induced customers to purchase something other than what they bargained for and something other than what was represented to them. *See Mesch v. United States,* 407 F.2d 1286, 1289-90 (10th Cir)., *cert. denied,* 395 U.S. 979. This was enough to make out the mail fraud charge.

In rejecting the appraisal evidence of the defense on the value of the property the trial judge said he was not going to turn the case into a land values case, that his rejection was based in part on Rule 403, FRE on "collateral-

ness," that whatever relevance the evidence might have was "way outweighed by the collateralness problem it presents," and that the question was whether the defendants "lied in making sales or attempting to make sales." V R.7. We find no error in the trial court's ruling and no defect in the government's case due to the lack of proof on the value of the land, in view of the specific misrepresentations which were sufficiently shown, as discussed earlier.

In sum, we believe that the jury's verdict is amply supported by the record and that the district court did not err in denying a judgment of acquittal.

We have examined the remainder of defendant's contentions and find that they require no further discussion. We are satisfied that no reversible error is demonstrated. Accordingly the judgment is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Criminal Action No. 77-CR-250

UNITED STATES OF AMERICA *Plaintiff,* *vs.* ROBERT K. BECK and GILBERT J. SZAJNA, *Defendants.*	REPORTER'S TRANSCRIPT OF ORAL ARGUMENT ON POST-TRIAL MOTIONS April 26, 1978

Proceedings before the HONORABLE RICHARD P. MATSCH, Judge presiding, Courtroom "B", United States District Court for the District of Colorado, U.S. Courthouse, Denver, Colorado, and a Jury of twelve, beginning at 1:30 p.m. on the 26th day of April, 1978.

APPEARANCES:

For the Plaintiff:

JAMES NESLAND, ESQ.
Assistant U.S. Attorney
323 U.S. Courthouse
Denver, Colorado 80294

For the Defendant:

BERNARD D. MORLEY
2250 S. Oneida #201
Denver, Colorado 80224

COURT'S RULING

And in this case, most particularly one because of the manner in which it was granted in the state, very informally, and were, as I am sure as testified by Mr. Beck, some considerable uncertainty on his part, as to whether he was, when he went before the Grand Jury a special Grand Jury.

Here, again, however, the law is clear that the federal government is not bound by such grants of immunity with the state government and the sole issue that I have authority to rule upon is whether the prosecutors here, the federal government has met the burden, the heavy burden, as the case has described it, and proved that the evidence presented was not tainted by the use of the immunized testimony before the Grand Jury.

Now there is some disagreement factually here about what Mr. Velthone did or did not do with respect to the records that were made available to him. But, based upon my record of that recollection of the testimony and, of course, the record will show it, it did not constitute a use of the testimony of Mr. Beck before the State Grand Jury in either the development of the investigator in the presentation of the case.

My finding is a finding of fact is that the government, the federal government has met the burden to show its evidence free of taint. (See Reporter's Transcript of Oral Argument on Post-Trial Motions, pp. 20 & 21).

The finding that I am making when I say that the government has met its burden of showing that its evidence was free of taint includes not just direct but, also, indirect use of that State Grand Jury. (See Reporter's Transcript of Oral Argument on Post-Trial Motions, p. 24.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Criminal Action No. 77-CR-250

UNITED STATES OF AMERICA, *Plaintiff,* *vs.* ROBERT K. BECK AND GILBERT J. SZAJNA, *Defendants.*	REPORTER'S TRANSCRIPT OF JURY VERDICT January 19, 1978

Proceedings before the HONORABLE RICHARD P. MATSCH, Judge presiding, Courtroom "B", United States District Court for the District of Colorado, U.S. Courthouse, Denver, Colorado, and a Jury of Twelve, beginning at 2:45 p.m., on the 19th day of January, 1978.

APPEARANCES:

For the Plaintiff:	JAMES E. NESLAND, ESQ. Assistant U.S. Attorney Room C-330 U.S. Courthouse Denver, CO 80204
For the Defendant: Robert K. Beck	BERNARD D. MORLEY, ESQ. 2250 South Oneida Suite 201 Denver, CO 80224
For the Defendant: Gilbert J. Szajna	MICHAEL S. AXT, ESQ. 1961 Stout Street Suite 2024 Denver, CO 80294

PROCEEDINGS

P. M. SESSION
JANUARY 19, 1978
2:45 P. M.

THE COURT: Both defendants present, all counsel present, bring in the jury.

(WHEREUPON, the following proceedings were had in open court in the presence and hearing of the jury:)

THE COURT: Mr. Collinson has the jury now arrived at a verdict?

MR. COLLINSON: Yes, Your Honor.

THE COURT: Please pass the verdict forms to the marshal.

(WHEREUPON, the foreman complied.)

THE COURT: Members of the jury, you will please listen to the reading of your verdict.

United States of America versus Robert K. Beck. We the jury upon our oaths say that we find as follows as to Defendant Robert K. Beck:

Count I, not guilty. Count II, not guilty. Count III, guilty. Count IV, not guilty. Count V, guilty. Count VI, guilty. Dated January 19, 1978. Thomas R. Collinson, Foreperson.

United States v. Gilbert J. Szajna. We the jury upon our oaths say that we find as follows as to the Defendant Gilbert J. Szajna:

Count I, not guilty. Count II, not guilty. Count III, not guilty. Count IV, not guilty. Count V, not guilty. January 18, 1978. Thomas R. Collinson, Foreperson.

Were they and are they your verdicts, Mr. Foreperson?

THE FOREPERSON: Yes, sir.

THE COURT: So say you all?

THE JURY: (Jury replied in affirmative.)

THE COURT: Would you like to have the jury polled?

MR. MORLEY: Yes, please.

THE COURT: Johnny Lee Wilson, were these and are these your verdicts?

THE JUROR: Yes.

THE COURT: Ruth J. Saderquist, were these and are these your verdicts?

THE JUROR: Yes, sir.

THE COURT: Thomas R. Muldoon, were these and are these your verdicts?

THE JUROR: Yes, Your Honor.

THE COURT: Debra Dale, were these and are these your verdicts?

THE JUROR: Yes.

THE COURT: Ward Richard Kenny were these and are these your verdicts?

THE JUROR: Yes, sir.

THE COURT: Buck Allen Burgett, were these and are these your verdicts?

THE JUROR: Yes, sir, Your Honor.

THE COURT: Thomas Richard Collinson, were these and are these your verdicts?

THE JUROR: Yes, sir.

THE COURT: Frank Edward Brown, were these and are these your verdicts?

THE JUROR: Yes, sir.

THE COURT: Thelma Jean Sanquist, were these and are these your verdicts?

THE JUROR: Yes, Your Honor.

THE COURT: Martin John Lohmann, were these are these your verdicts?

THE JUROR: Yes, Your Honor.

THE COURT: Katheryn R. Dunston, were these and are these your verdicts?

THE JUROR: Yes, Your Honor.

THE COURT: Stan Morris Lauthan, were these and are these your verdicts?

THE JUROR: Yes, Your Honor.

THE COURT: The jury has been polled. The verdicts are received.

Members of the jury, you have now completed the task which was given to you in this case.

We, the public and the Court wish to express appreciation for your service in this case recognizing that it was long, somewhat difficult and that it required something more than ordinary efforts to accomplish. I will tell you a couple of things that were kept from you in this case. One is that the Defendant O'Keefe did plead guilty pursuant to a plea agreement in this court in which the Government permitted him to plead guilty to one count and dismiss the other counts. On that plea of guilty I sentenced him to five years in prison. With respect to the Defendant Baldwin — or not defendant, but the participant Baldwin, you heard

from him what happened with respect to him. The other defendant Short will be giving a plea agreement, as I understand it, to plead to a charge in Arizona; is that right, Mr. Nesland?

MR. NESLAND: Yes, under Rule 20, Your Honor.

THE COURT: And the case against him here in Colorado will be dismissed, this by agreement with the Government.

Understand when we talk about plea agreements, they do not involve the Court, but the prosecuting authority. So that's a part of the story that was kept from you in the case, and necessarily so because we didn't want you influenced by them. And keeping you from contact with the other communications, the disposition with respect to Mr. Beck was mentioned in one of the stories that was out in the newspaper. You are now dismissed from further service on the jury panel. In view of the length of this case, we are not going to call on you for any further service in any other trials during your jury panel.

We do understand this disruption in your ordinary lives and particularly those of you from out of town, quite a ways out of town, it's somewhat inconvenient. But you have performed the highest obligation there is of citizenship in the United States.

With our appreciation you are now excused.

(WHEREUPON, the jury was excused.)

THE COURT: We will make a record.

The article, I think that you gave to me, Mr. Morley, from the Rocky Mountain News for Sunday, January 15, 1978, mark that Court Exhibit 2. That will be made a part of the record.

The counsel will note that the one verdict was dated yesterday, January 18th, with respect to Mr. Szajna and the

verdict with respect to Mr. Beck is dated today. I do wish to make some further record here.

It's my practice in all jury trials to make sure the record reflects and counsel and the accused know everything that I know about the jury. In this case at the time of the recess yesterday afternoon -- well, first of all, I, of course, called the jurors in and recessed them without asking them if they had arrived at any verdict or might in the near future. And, when the jury was back in the jury room and my staff, that is to say, Mr. Tobaski (phonetic) and Miss DeLuca went in to pick up the exhibits from the jury as we routinely do and the verdict forms having no idea that anything had been written on any verdict form, Mr. Tobaski received from the jury the verdict forms, brought them into my chambers. I looked and saw something had been written on one.

Without reading them, I immediately turned them over and directed Mr. Tobaski to seal them which was accomplished in an envelope which we will mark Court Exhibit 3, and of course, instructed Mr. Tobaski that he was to communicate to no one what, if anything, he had read on the verdict forms as he received them.

This morning without consultation with any lawyer in the case, I caused a communication to be sent to the jury by placing it on the sealed envelope in which the verdict forms were which said as follows: "The verdict forms have been seen only by the Clerk who received them from you at the time of the recess and who sealed them in this envelope without revealing their contents to anyone. Your verdicts are not final until they are returned in open court."

And I signed that communication sending it to the jury. And counsel, of course, are free to inspect the verdict

forms. They do not show any strike throughs or changes at all on them and they are completed in ink.

Mr. Tobaski is here in the courtroom and would answer any questions we have as to what he saw if you have any?

MR. MORLEY: I don't think so, Your Honor.

THE COURT: All right, do you have any questions of me? I mean, I have told you everything I know about it.

MR. MORLEY: That's the same verdict, there has only been one piece of paper?

THE COURT: Only one form has been handed to them and these are the forms that have been handed to me that afternoon. I would just ask Mr. Tobaski to say if there is anything inconsistent with what you recall when you took them from the jury last night?

MR. TOBASKI: Not at all. That's what I read.

THE COURT: The entry is, of course, Mr. Szajna is on this verdict discharged in the case.

With respect to Mr. Beck, the entry of judgement on the verdict will be deferred pending the presentence investigation and report. Also, as I indicated in the handling of the motion for dismissal for preindictment delay, I will provide an opportunity, if you wish it, Mr. Morley, to submit additional evidence with respect to that motion and I will give you a few days to decide what you want to do about that. You don't have to decide it in the moment here.

MR. MORLEY: Thank you, Judge.

THE COURT: Additionally, I am going to ask, as a part of the presentence report, we will go ahead and start the presentence investigation, as a part of that I am going

to ask the probation officers to inquire into the state grand jury proceeding and what with respect to Mr. Beck's testimony, what he was promised there. And if you wish it, this again is something you can think about, I will provide you an opportunity to call to the witness stand here before me the special state prosecutor or anyone else you wish to have called on the subject of that state grand jury proceedings because I think in terms of what has happened here and the differences among the persons, not this verdict, but the different agreements that have been made with respect to Mr. Baldwin and Mr. Short and Mr. O'Keefee, that I would like to know more about the state grand jury proceeding before I determine the sentence with respect to Mr. Beck.

MR. MORLEY: Thank you, Your Honor.

THE COURT: All right, is there anything further at this time?

The defendant, of course, there is no objection to continuing the bond?

MR. NESLAND: No, Your Honor.

MR. MORLEY: There was not a bond, Your Honor. It was done by summons.

THE COURT: All right, the same terms and conditions, whatever they were.

Very well, on this matter the court's in recess. We will be in recess in the trial for five more minutes.

(WHEREUPON, the court was in recess at the hour of 3:00 p.m.)

REPORTER'S CERTIFICATE

I, JOSIE HUTSELL, Registered Professional Reporter and Substitute Official Reporter to this Court, do hereby certify that I was present at and reported in shorthand the proceedings in the foregoing matter; that thereafter my shorthand notes were reduced to typewriting under my supervision, comprising the foregoing official transcript; further, that the foregoing official transcript is a full and accurate record of the proceedings in this matter on the date set forth.

DATED at Denver, Colorado, this 19th day February, 1979.

JOSIE HUTSELL, RPR

Josie Huttsell, RPR